"I can understand it if the claimant did not do anything positive for a month at least to enable the defendant to delivery the machinery but to wait until the machinery were seized and then state that its right to repossess had just arisen then is stretching this right too far..."

We see no reason to interfere with the decision of the learned Judge. Accordingly, we dismissed the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; Azam-Malek & Soh.*

MANANG LIM NATIVE SDN. BHD. v. MANANG SELAMAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 8 & September 12, 1958]

[Kuching – Supreme Court Civil Appeal No. 210 of 1984]

Native Area Land – Agreement and Declaration of trust – Caveat – Application to remove – Qualified prohibition – Whether "native" includes company – Sarawak Interpretation Ordinance, s. 2 – Land Code (Sarawak Cap. 81), ss. 2, 8, 9 & 177 – Federal Constitution, art. 161.

Contract – Dealing in native land – Illegal contract – Contracts Act, 1950, s. 2(g).

In this case the respondent was registered as the proprietor of land classified as Native Area Land. He executed two documents (a) an agreement and (b) a declaration of trust. In the latter document he declared that he held the land in trust for the appellant. No authorization of the Yang di-Pertua Negeri had been obtained. A caveat was lodged by the appellant in respect of the said land and this was duly registered. The respondent applied for an order to remove the caveat. The High Court allowed the application and awarded costs to the respondent ([1986] 1 M.L.J. 312). The appellant appealed.

Held: (1) having regard to the definition of "native" in the Sarawak Interpretation Ordinance it would appear that the clear intention of Parliament is to confine the meaning of native to a natural person. The word "native" is therefore limited to only a natural person;

(2) the agreement made between the respondent and the appellant was an agreement made in contravention of section 8(b) of the Sarawak Land Code. As such it was entered into for an illegal consideration and was therefore a void agreement within the meaning of section 2(g) of the Contracts Act, 1950;

(3) since the appellant lodged the caveat to protect an agreement which is expressly prohibited by statute it follows that the appellant cannot lawfully assert any interest in the said land. The consideration being deemed to be illegal, an order must be made for the removal of the caveat.

Cases referred to:

(1) *Daimler Co. Ltd.* v. *Continental Tyre* [1916-1917] All E.R. Rep. 191.
(2) *H.M. Prosecutor-General* v. *M.C. Spencer, Controller of Mitsui & Co. Ltd.* [1945] A.C. 124.
(3) *Sussex Peerage Case* (1844) 8 E.R. 1034, 1057.

SUPREME COURT.

Miss S.Y. Chan for the appellant.
James King for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): The respondent, Manang Selaman anak Nyalau *alias* Lim Kim Tui is registered as the proprietor of that parcel of land situate at Bintawa, Kuching, Sarawak containing an area of 5.84 acres, more or less and comprised in Kuching Lease of State Land No. 5352 of 1952 (hereinafter referred to as the said land). On February 4, 1974 the respondent executed two documents, *viz.* (a) Agreement and (b) Declaration of Trust. In the latter document, the respondent declares that he is holding the said land together with another piece of land situate at Mugok Ayer Trejun, Kuching, Sarawak containing an area of 1.34 acres, more or less and described as Lot 4412 Muara Tebas Land District (for which we are not concerned) in trust for the appellant, Manang Lim Native Sdn. Bhd. A caveat was lodged by the appellant on December 12, 1974 in respect of the said land and this caveat was duly registered at the Kuching Land Registry office as Instrument No. L8916/1974 (hereinafter called the said caveat). On December 2, 1982 the respondent took out a Originating Motion in the High Court at Kuching pursuant to section 177(1) of the Sarawak Land Code (Cap. 81) for an order to remove the said caveat. An affidavit was filed in support of the motion. The appellant delivered an affidavit opposing the application. After hearing the submissions of learned counsel for the parties the learned judge ordered the said caveat be removed and awarded costs also to the respondent. The learned judge said:

"I hold that the two documents, namely, the agreement and the trust deed above referred to, are illegal as being made in contravention of the provisions of section 8 of the Land Code, in that they relate to a dealing which is prohibited by law, and are, therefore, void and unenforceable. Consequently, the respondent (the appellant in this appeal) can have no valid claim to an interest in the said land under or by virtue of the said two documents or either of them, such as would entitle it to maintain the caveat lodged by it against the said land."

It is common ground that the said land is classified as "Native Area Land" under the Sarawak Land Code (Cap. 81) and for the purpose of this appeal "Native Area Land" has been statutorily defined in section 2 of the Code to mean "land other than Mixed Zone Land (a) held by a native under a document of title".

Under section 8 of the Code it is enacted that:

"Save as provided in section 9 –

(a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land ...

(b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration and, in particular ... any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished."

However, the rights and privileges of any native shall not be adversely affected by any agreement to which paragraph (b) applied (see paragraph (e)).

Section 9 reads:

(1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or of any rights or interest in or over such land –

(a) under or by virtue of any law for the time being regulating prospecting for minerals, including mineral oils, or the taking of forest produce;

(b) whenever such non-native has become identified with and subject to any native system of personal law;

(c) whenever such non-native has been issued with any permit relating to Native Area Land or Native Customary Land, issued under any rules made under section 8A of the former Land (Classification) Ordinance, 1948, or issued under rules in that behalf under section 213, to the extent of the rights conferred by such permit;

(d) under or by virtue of a dealing executed by the registered proprietor of Native Area Land in favour of such person as may be authorized by any general or special direction of the Yang di-Pertua Negeri in Council, and in any such case that person shall, for all purposes of this Code relating to the dealing, be deemed to be a native;

(e) whenever such non-native has been issued with any licence under this Code to extract and remove earth, gravel, clay, stone, coral, shell, guano, sand or lime.

(2) For the purposes of this section, a person shall be deemed to have become identified with and subject to any native system of personal law upon any event upon which any written law provides he shall become so identified and subject or if he is accepted by any native community as being identified with and subject to the system of personal law of such community."

In our opinion, having regard to the provisions of section 9 of the Code, the prohibition contained in section 8 does not appear to be an absolute one but only a qualified prohibition and it seems to us that any dealing of Native Area Land by a native of Sarawak with a non-native may be allowed if it is specifically authorised by the Yang di-Pertua Negeri in Council for the purpose. Since no authorisation has been produced by the appellant we will assume that none was given by the Yang di-Pertua Negeri in Council.

The main thrust of the appellant's submission was that the word "native" should be extended to include a company incorporated under the law if the company are under the control of native shareholders or directors. In support of this contention reference has been made to *Daimler Co. Ltd.* v. *Continental Tyre*[1] and *HM Procurator-General* v. *M.C. Spencer, Controller of Mitsui & Co. Ltd.*[2] The decisions in these cases do not, in our opinion, assist to solve the problem raised in this appeal. These two cases involved interpretations of provisions under the Trading with the Enemy Acts in time of war and are in our opinion, inapplicable. In our judgment, the question whether "native" should include a legal entity like a corporation established under the Companies Act 1965 or any other law of Sarawak would depend upon the intention of Parliament and the intention of the legislature can be gathered from the statutory definition of the word "native" contained in section 2 of the Sarawak Interpretation Ordinance (Cap. 1), which reads:

" 'native' means a British/Malaysian subject of any race which is now considered to be indigenous to Sarawak as set out in the Schedule."

Now, the law on this point is clear. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver (*per* Lord Tindal C.J. in *Sussex Peerage Case*[3]).

Learned counsel for the appellant did not argue that the statutory definition is uncertain or ambiguous and she seems to concede that having regard to the use of such words like "subject", "race" and "indigenous to Sarawak" it would

appear that the clear intention of Parliament is to confine the meaning of "native" to a natural person. With this concession we are in agreement. On the other hand, the word "non-native" has been defined by section 2 of the Sarawak Land Code (Cap. 81) to mean "any person who is not a native of Sarawak as defined by the Interpretation Ordinance". And "person" has the meaning attributed to it by the Interpretation Ordinance. Under section 2 of the Sarawak Interpretation Ordinance (Cap. 1) "person" or "party" includes any company or association or body of persons, corporate or unincorporate, and this interpretation shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation". Applying this to the facts herein, it follows that a "non-native" would include not only a natural person but also a legal entity like a company established by law. In other words, whereas the word "native" is limited to only a natural person but a "non-native" would include a corporation as well.

Support for this restricted interpretation of the word "native" of Sarawak may be found in Article 161 of the Federal Constitution and the relevant part reads:

> "(6) In this Article "native" means –
>
> (a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause 7 as indigenous to the State or is of mixed blood deriving exclusively from those races;
>
> (b) ... "

In our opinion, the fact that a "native" of Sarawak must not only be a Malaysian citizen but must also belong to one of the races indigenous to Sarawak would indicate the clear intention of Parliament to confine it only to natural person and to exclude artificial person like a corporate body. If that is the intention of the legislature, in our opinion, it is unnecessary to consider whether or not the appellant are controlled by native shareholders or directors. That question does not arise for determination in this appeal. The main contention of learned counsel for the appellant therefore fails.

Next, it was argued by learned counsel for the appellant that the declaration of trust was not illegal under section 8(b) of the Code inasmuch as sub-paragraph (b) refers to "any agreement" and it was submitted that the trust deed was not "an agreement" in law. It was contended that an agreement necessarily involves the assent of at least two persons whereas the declaration of trust consisted of a document made by the respondent only. In answer to this contention, it was pointed out by learned counsel for the respondent (correctly in our opinion) that in lodging the caveat on December 12, 1974 which is the subject of this appeal, the appellant relied on (a) an Agreement dated February 4, 1974 and (b) a Declaration of Trust of the same date. Paragraph 2 of the trust deed provides, *inter alia*, that "this Declaration is supplemental to a Deed of Agreement made between the Trustee (Respondent) therein referred to as the First Party and Manang Lim Native Sdn. Bhd. (Appellant) therein referred to as the Second Party ..." There was no need to decide whether the phrase "any agreement" used in section 8(b) includes a trust deed or not because in our judgment, the Agreement of February 4, 1974 entered into between the respondent and the appellant which was relied on to support the caveat was an agreement made in contravention of sub-paragraph (b) of section 8 of the Code. As such it was deemed to have been entered into for an illegal consideration and was therefore a void agreement within the meaning of section 2(g) of the Contracts Act 1950. Since the appellant lodged the caveat to protect an agreement which is expressly prohibited by statute it follows that the appellant cannot lawfully assert any interest in the said land. The consideration being deemed to be illegal, the High Court has no option but to order for the removal of the caveat and there is no power to impose any terms. This is clearly spelt out in the second limb of section 8(b) of the Code.

For the above reasons, we therefore affirm the judgment of the learned judge and dismiss the appeal with costs. The deposit of $500.00 to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Ee & Lim; Loke, King & Co.*